

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES C. MCCURDY,
Plaintiff,

v.

M. RIVERO, et al.,
Defendants.

Case No. 17-01043 BLF (PR)

**ORDER SETTING BRIEFING
SCHEDULE; SEVERING CLAIM
AGAINST DEFENDANT THOMAS
AND DIRECTING CLERK TO OPEN
IN A NEW ACTION; DENYING
MOTION FOR APPOINTMENT OF
COUNSEL; INSTRUCTIONS TO
CLERK**

(Docket No. 105)

Plaintiff, a California inmate, filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against prison officials at various institutions. The Court found the amended complaint, (Docket No. 11), stated cognizable claims under the Eighth Amendment, and ordered Defendants to file a motion for summary judgment or other dispositive motion. (Docket No. 13.) SQSP Defendants Alvarez, Deal, Devers, Leighton, Pratt, Tootell, and Wu, along with PBSP Defendants Jacobsen, McLean, and Thomas, filed a motion to dismiss and motion for summary judgment; Defendants Lee and Rivero filed notice of joinder to the motion. (Docket Nos. 67 & 80.) The Court granted in part the motion for summary judgment based on failure to exhaust administrative remedies and found the only exhausted claims were the following: (1) claim against Defendant Deal at SQSP for discontinuing his Tramadol medication; and (2) claim against Defendant

1 Thomas at PBSP for improperly discontinuing his pain, cramping, diarrhea, and
2 indigestion medications. (Docket No. 104 at 15, 18, 29.) All the other claims against
3 Defendants were dismissed for failure to exhaust administrative remedies. (*Id.*) The Court
4 also granted Defendants' motion to dismiss for improper joinder of claims and parties and
5 directed Plaintiff to file notice which of the two exhausted claims he wished to pursue.
6 (*Id.*)

7 Plaintiff has filed notice that he wishes to proceed with the claim against Defendant
8 Deal for discontinuing his Tramadol medication and have the claim against Defendant
9 Thomas severed and opened as a separate action. (Docket No. 106.) Accordingly, the
10 Court orders briefing to proceed on the claim against Defendant Deal in this action. The
11 claim against Defendant Thomas shall be severed and opened as a separate action.

12 Plaintiff also filed a motion for appointment of counsel on the grounds that he
13 issues involved are complex, he has limited access to the law library, and he has limited
14 knowledge of the law. (Docket No. 105.) The motion is DENIED without prejudice for
15 lack of exceptional circumstances. *See Agyeman v. Corrections Corp. of America*, 390
16 F.3d 1101, 1103 (9th Cir. 2004); *Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997);
17 *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Wilborn v. Escalderon*, 789 F.2d
18 1328, 1331 (9th Cir. 1986). This denial is without prejudice to the Court's sua sponte
19 appointment of counsel at a future date should the circumstances of this case warrant such
20 appointment.

21 22 CONCLUSION

23 For the reasons state above, the Court orders as follows:

- 24 1. The only remaining Defendant in this action is Defendant Dr. Deal. The
25 Clerk of the Court shall terminate all other Defendants from this action.
- 26 2. In accordance with Plaintiff's wishes, the Clerk shall use a copy of the
27 amended complaint, (Docket No. 11), to open a separate action against Defendant Thomas

1 for improperly discontinuing Plaintiff's pain, cramping, diarrhea, and indigestion
2 medications. The Clerk shall file a copy of this order in that action, send Plaintiff a notice
3 regarding payment of the filing fee, and the court's *In Forma Pauperis* Application.

4 3. Plaintiff's motion for appointment of counsel, (Docket No. 105), is
5 DENIED.

6 4. No later than **fifty-six (56) days** from the date this order is filed, Defendant
7 Deal shall file a motion for summary judgment or other dispositive motion with respect to
8 the remaining exhausted claim against him.

9 a. Any motion for summary judgment shall be supported by adequate
10 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
11 Civil Procedure. Defendant is advised that summary judgment cannot be granted, nor
12 qualified immunity found, if material facts are in dispute. If Defendant is of the opinion
13 that this case cannot be resolved by summary judgment, he shall so inform the Court prior
14 to the date the summary judgment motion is due.

15 b. **In the event Defendant files a motion for summary judgment, the**
16 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**
17 **warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**
18 ***Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).**

19 5. Plaintiff's opposition to the dispositive motion shall be filed with the Court
20 and served on Defendant no later than **twenty-eight (28) days** from the date Defendant's
21 motion is filed.

22 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and
23 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment
24 must come forward with evidence showing triable issues of material fact on every essential
25 element of his claim). Plaintiff is cautioned that failure to file an opposition to
26 Defendant's motion for summary judgment may be deemed to be a consent by Plaintiff to
27 the granting of the motion, and granting of judgment against Plaintiff without a trial. *See*

1 *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18
2 F.3d 651, 653 (9th Cir. 1994).

3 6. Defendant *shall* file a reply brief no later than **fourteen (14) days** after
4 Plaintiff's opposition is filed.

5 7. The motion shall be deemed submitted as of the date the reply brief is due.
6 No hearing will be held on the motion unless the Court so orders at a later date.

7 8. All communications by the Plaintiff with the Court must be served on
8 Defendant, or Defendant's counsel once counsel has been designated, by mailing a true
9 copy of the document to Defendant or Defendant's counsel.

10 9. Discovery may be taken in accordance with the Federal Rules of Civil
11 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
12 Rule 16-1 is required before the parties may conduct discovery.

13 10. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
14 court informed of any change of address and must comply with the court's orders in a
15 timely fashion. Failure to do so may result in the dismissal of this action for failure to
16 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

17 11. Extensions of time must be filed no later than the deadline sought to be
18 extended and must be accompanied by a showing of good cause.

19 This order terminates Docket No. 105.

20 **IT IS SO ORDERED**

21 Dated: October 9, 2018



BETH LABSON FREEMAN
United States District Judge